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Supreme Court of the United States

October Term, 1958

No. 136

JAMES ALONZO DRAPER,

Petitioner,

vs.

UNITED STATES OF AMERICA.

REPLY BRIEF FOR PETITIONER

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1. The government devotes the greater part of its brief to the proposition that an informer's statements may be considered in determining whether an arrest without warrant is justified (pp. 10-28). As we pointed out in our main brief (p. 8), petitioner's case does not require a decision on that subject.

The government's chief reliance is on *Brinegar* v. *United States,* 338 U. S. 160. But that case dealt with a moving automobile and involved observation by the arresting officers of matters which justified an inference that the car was engaged in an illicit enterprise. No question of statements by an informer was involved. We do not see how the decision in that case is relevant here. Mr. Justice Rutledge's discussion of probable cause quoted by the government (pp. 11, 12) occurred in relation to matters known to the officers not competent at a trial on the merits, but not at all to hearsay. We believe that the controlling consideration is to be found in the following statement with reference to moving automobiles (not quoted by the government):

> " * * * In such a case the citizen who has given no good cause for believing he is engaged in that

> sort of activity is entitled to proceed on his way without interference. But one who recently and repeatedly has given substantial ground for believing that he is engaging in the forbidden transportation in the area of his usual operations has no such immunity, if the officer who intercepts him in that region knows that fact at the time he makes the interception and the circumstances under which it is made are not such as to indicate the suspect is going about legitimate affairs." (338 U. S. at 177)

We do not see how the government can derive any benefit from *Costello* v. *United States*, 350 U. S. 359, or *Nowak* v. *United States*, 356 U. S. 660 (cited p. 17). In the first of these this Court was motivated by fear that an inquiry into the nature of the evidence heard by a grand jury would result in great delay (350 U. S. at 863); in the second case the function of the affidavit was merely to inform a defendant of the basis of the denaturalization proceeding.

It may be that exceptional circumstances might justify reliance on hearsay—as when an officer is requested to make an arrest by an eye witness to a serious crime. But surely this is not such a case.

2. In discussing the facts of this case the government (brief, pp.28-37) places great reliance on the supposed "corroborating facts." But, as we have already noted (main brief, p. 10), none of these facts bore on the commission of a crime. Certainly the fact that a man returns from a distant city on the second of two indicated dates proves nothing—nor does the fact that he corresponds to the description given. These facts establish that the informer knew defendant and had some information about his movements. But there was no testimony that the informer had told the officer that he had been with defendant in Chicago and had seen him buy narcotics—nor even any testimony as to whether the officer had ever inquired from the informer on what he based his conclusions.

The government, while conceding the absence of such testimony (brief, p. 10, note 2; p. 32), seems to suggest that petitioner should have inquired on the subject at the hearing. We submit that petitioner was under no such obligation. Once it was conceded that the arrest was without warrant the burden was on the government to justify. Its agents were in possession of the facts, petitioner was not.

But the government takes the position (brief, pp. 7, 31, 33) that the fact of petitioner's return from Chicago justifies an inference by the arresting officer not only that he had gone there for an illicit purpose (which is all that the informer had ever told the officer), but also that this objective had been accomplished! We submit that neither inference is permissible. Moreover, as we have already pointed out (main brief, pp. 10, 11), the informer did not tell the officer that the crime of transportation had been committed; only that petitioner "was going to bring back" some heroin (R. 8). Indeed, there is nothing in this record to suggest that the informer had even told the officer that petitioner had actually bought any heroin.

We are asked to infer from the "corroborating" fact of return from Chicago that heroin had in fact been purchased, that it had been illegally imported into the United States, and that petitioner had knowledge of such unlawful importation—for that is the charge here (R. 1). We submit there is no logical basis for any of these inferences.

The government (brief, p. 34) cites two cases not referred to in the court below: *Browner* v. *United States*, 215 F. 2d 753, and *United States* v. *Jackson*, 149 F. Supp. 937. We do not believe that either of those cases was correctly decided, although the second may rest on the circumstance that a moving automobile was involved.

Finally the government (brief, pp. 36, 37) pleads for an extension of the moving vehicle cases to all narcotics

cases, on the ground that narcotics can be easily hidden—citing *United States* v. *Kansco,* 252 F. 2d 220. But in that case the officer did what was not done in the case at bar. After receiving information the officer checked the movements and activities of the suspect and in this way observed actions which justified the arrest—particularly the suspect's "agitation" when he noticed he was being observed. Those facts are altogether different from what might be described as the "shot gun" behavior of the officer in the case at bar.

We submit that none of the arguments advanced by the government justifies what occurred here.

Respectfully submitted,

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